IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Civil Writ Petition No.1102 of 2000

Major Anurag Pathak — Petitioner
Vs.
Union of India — Respondent

Ms.P.D.Anklesaria with Ms.S.V. Bharucha for petitioner.

Mr.Rajiv Chavan with Ms.Rutuja Ambekar for respondent.

CORAM: B.H.MARLAPALLE & J.H.BHATIA,JJ.

Reserved on : November 16, 2006.
Pronounced on : December 06, 2006.

JUDGMENT (PER B.H.MARLAPALLE,J.)

1. The petitioner was a Company Commander at Bhatinda, Punjab in 236 Engineer Regiment in the years 1991-93 and his Confidential Reports during the said period showed him to be an Officer of integrity, efficiency and reliability. He was assigned foreign posting at Bhutan in the Border Road Organisation, Project Dantak on independent command as an Officer Commanding 60 Road Construction Company under 19 BRTF (Border Road Task Force) from 1993-96. After this assignment the petitioner came to be posted as an Instructor in the Faculty of Civil Engineering in the college of Military Engineering at Pune and in March 1998 he was called upon to record the summary of

evidence of an enquiry. On reaching Bhutan he was orally informed that on some payment vouchers, his thumb impression was found superimposed on the thumb impression of the casual labourer to whom payment was made during his tenure at Bhutan during 1993-96. He submitted an explanation and his summary of evidence came to be recorded immediately. Thereafter in March 1998 a Court Martial was ordered against him and charges were framed on 18/7/1998 for the offences under Sections 52(f) and 57(a) of the Army Act, 1950. The General Court Martial convicted the petitioner for the first and the fifth charge i.e. under Sections 52(f) and 57(a) of the Army Act, 1950 on 11/8/1998 and on the same day after hearing, he was sentenced to be dismissed from service. This order of conviction and sentence was submitted for confirmation to the General Officer Commanding-in-Chief, Eastern Command who by his order dated 16/2/1999 was pleased to confirm the findings of conviction and sentence but commuted the sentence of dismissal awarded by the Court Martial to the following :

(a) To forfeit five years past service for the purpose of pension, and

(b) To be severely reprimanded.

2. This petition filed under Articles 226 and 227 of the Constitution impugns the said order of conviction and sentence.

3. The charges proved against the petitioner, as per the General Court Martial and confirmed by the General Officer Commanding-in-Chief are as under:

(a) Such an offence as is mentioned in clause (f) of Section 52 of the Army Act with intent to defraud. In that he, at Bhutan, KM 161 PT Road - MT Bridge 607/281, (60 RCC) on or about 08 March 1994, with intent to defraud put his right thumb impression against serial No.96, in respect of Shri Fransis s/o. Johanan in form BRDB-19 General Reserve Engineer Force (Special wages Bill Imported Labour) voucher No.CV/60/101/404/CPL dated 28 Feb. 94, and thereby detained Rs.840/- (Rupees Eight hundred forty only).

(b) In a certificate signed by him

knowingly making a false statement, an offence under Section 57(a) of the Army Act. In that he, at Chapcha (Bhutan) on 24 Aug. 95 as Officer Commanding, 60 Road Construction Coy (GREF) in a certificate signed by him stated "This is to certify that Code No. 11352/60 ANANDA SARKAR s/o LATE CHANDRA MOHAN SARKAR Vill & PO : Kupadaha, Dist : Malda, State : West Bengal has worked as CP Labour in 60 RCC (GREF) wef 21 Jan 95 to till date with intermittent break in service" well knowing the said statement to be false.

4. In respect of both the charges the prosecution examined four witnesses and the defence examined two witnesses. So far as the first charge is concerned, the prosecution examined two main witnesses and the third witness Shri Ashis Kumar Mohapatra, Administrative Officer, 19 BRTF was examined only to submit the record. The first witness of the prosecution was Shri Rakesh Kumar Verma, Superintendent, Building and Road (B/R) Grade I of HQ 42 BRTF (Tripura) and the second witness was the finger print expert Shri Ataul Rehman, Sub Inspector of Assam Police, Office of the Addl. DGP (CID),

Ulubari, Guwahati. The Court Martial has discarded the testimony of the first witness and has relied upon the testimony of the second witness (finger print expert), so as to hold that the first charge against the petitioner under Section 52(f) of the Army Act is proved. So far as the second charge is concerned, there is only one witness i.e. Shri S.C. Roy of 215 PW PL/112 RCC, Project Udayak (Arunachal Pradesh), in respect of the certificate at Exhibit "S" from E-2 Section of 60 RCC. He stated that the said certificate was received by him but could not recollect as to who actually gave it to him. He further stated that the said certificate was required for his brother-in-law, Shri Anand Sarkar and, therefore, through Shri Roop Kishore he approached the petitioner. Though he stated that the certificate was required to secure any job for his brother-in-law either in GREF or elsewhere, the said certificate was not a guarantee that the job will be secured. He also admitted that his brother-in-law Anand Sarkar could not secure any job on the basis of the said certificate. It was not his case that the certificate was issued for any extraneous considerations. He further admitted that his immediate superior was BR- Grade I Shri Roop Kishore

and his next Superior was OIC Shri V.N. Prasad. From his testimony it is clear that he was one of the men in the battalion commanded by the petitioner. It has also come on record that Shri Anand Sarkar had not worked as CP Labourer in 60 RCC. The petitioner accepted this fact of the issuance of the certificate but justified the same by stating that as and when the men of his battalion approached for some favours for their welfare, he used to oblige them. The certificate marked "S" is one such favour granted to Shri S.C.Roy who wanted the said certificate for seeking employment to his brother-in-law. The certificate was not prepared by the petitioner and in routine course it was prepared by his subordinates and he signed the same when it was placed before him.

. Section 57(a) of the Army Act, 1950 reads as under:

> **"57. Falsifying official documents and false declaration. -** Any person subject to this Act who commits any of the following offences, that is to say -
>
> (a) in any report, return, list, certificate,

book or other document made or signed by him or of the contents of which it is his duty to ascertain the accuracy, knowingly makes or is privy to the making of any false or fraudulent statement; or

(b) ... (c) ... (d) ... (e) ...

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as in this Act mentioned.

5. We are, therefore, satisfied on analysis of the depositions of Witness No.4 - Shri S.C. Roy and the petitioner's statements that the certificate at Exhibit "S" was issued by him while the said Shri Anand Sarkar had not worked as CP Labourer in 60 RCC and it was a false certificate and at the same time Shri Anand Sarkar did not derive any benefit from the certificate and which certificate was not issued for any oblique motives or for any considerations or favours etc. We, therefore, uphold the findings of the Court Martial and as confirmed by the General Officer Commanding-in-Chief that the charge under

Section 57(a) of the Army Act was duly proved against the petitioner.

6. The proceedings of GCM cannot be equated with the proceedings of the domestic tribunal. The law of evidence is not applicable to the domestic tribunal in its strict sense. In GCM it is for the prosecution to prove the charge framed against the accused and this burden of proving the charge cannot be shifted on the accused calling upon him to prove his innocence. It is for the prosecution to lead evidence of the witnesses concerned and through their testimony prove the charge, corroborated with the documentary evidence on record. Charge (a) which has been quoted hereinabove in para 3 is regarding an offence under Section 52(f) of the Army Act. The gist of the said charge is that in Special Wages Bill Imported Labour under Voucher No. CV/60/101/404/CPL prepared on 28th February 1994 the petitioner on or around 8th March 1994 put thumb impression at Sr.No.96 in place of Shri Fransis s/o. Johanan and received an amount of Rs.840/- (Rupees eight hundred forty only) with an intention to defraud. Admittedly Shri Fransis s/o. Johanan was not examined by the prosecution. As noted earlier, the GCM has held the

said charge proved only on the basis of testimony of finger print expert Shri Ataul Rehman and it has discarded the testimony of its own witness Shri Rakesh Verma who was at the relevant time Superintendent, Building and Roads, Grade I of HQ 42 BRTF (Tripura). His testimony has been discarded only on the ground that some of the statements made by him were found to be contradictory. The principle "falsus in uno, falsus in omnibus" is not applicable in the Indian criminal law system and, therefore, just because the witness gave some false or contradictory statements, it is not permissible to discard his testimony in its entirety. The testimony of this witness was required to be considered only with respect to the alleged thumb impression of the petitioner at Sr.No.96 in form BRDB-19 General Reserve Engineer Force prepared on 28th February 1994 and if in some other context the said witness has given some false or contradictory statements, those have no bearing on the main charge to be proved against the petitioner. He was shown the Special Wage Bill (Labour) and he admitted that the said bill was prepared by him and all the entries except on the first page were in his hand. He also identified the signatures of AEE (Civil) Shri V.N. Prasad

(Inspecting Officer), Major Anurag Pathak (petitioner) and his own signatures. The document ran into six pages and it was a copy of the wage bill for the period from 21/1/1994 to 20/2/1994 and there were in all 103 entries. The document received and marked as Exhibit "M" was shown to him and he stated that against every entry there was a thumb impression of the person concerned who received the wages amount shown therein and his initials appeared along side the thumb impressions. In his examination-in-chief he was not called upon to identify the signatures at Sr.No.96 at Exhibit "M" and, therefore, in his cross-examination to Question No.8 he replied as under"

> "At times OC used to come and check my mode of payment to labourer and at times used to even guide the labourers as to how to put thumb impressions.
>
> It is correct that with reference to Exhibit "M" I was given Rs.79050/- from the RCC HQ for making the payments. It is also correct that total money paid was Rs.78400/- and that I deposited the balance to RCC HQ. Since one CPL was not paid hence this balance amount was deposited back. I cannot recollect as to

whether this particular labourer was absent, on leave or had proceeded on discharge. As regards identifying labourers at the time of making payment, I used to call the Gang leader who used to then identify the labourers. After myself also identifying the labourer, the payment used to be made.

It is correct that my initials alongside thumb impression on Exhibit "M" signify my attestation that the thumb impression belongs to the person to whom the payment has been made and whose name appears in that entry of the muster roll.

I am now shown Sl.No.96 of Exh "M". This entry pertains to Code/Ticket No.8984/60 BELD Shri Fransis, S/O Shri Johanan. The thumb impression appearing against this entry Sl.No.96 is that of Shri Fransis. The thumb impression is encircled in Red and marked M-4. The entry numbers near each thumb impression are in my hand. Letter "D" is not in my hand.

It is correct that I have never paid any money

to Maj Anurag Pathak after showing the payment having made to any labourer. The wage money of Rs.840/- pertaining to Shri Fransis was paid to him only and not to Maj Anurag Pathak.

It is correct that Maj Anurag Pathak has never put him thumb impression on Exhibit "M".

I cannot remember whether or not Maj Anurag Pathak visited my sector when payment on Exhibit "M" was made by me. I cannot remember if Shri Fransis continued as a CPL after 21 Feb 94 also. As far as I can recollect I have not come across any complaint from Shri Fransis that he did not receive his wage money for the period 21 Jan 94 to 20 Feb 94. If payment is not made against entry of any labour I will not be putting my initial in that entry. Wherever my initials appear alongside thumb impressions they signify that payment has been made to the correct individual."

After the said depositions were recorded in the cross-examination, the prosecutor reexamined this

witness and he replied to the question asked by the prosecution in the following words:

> "It is correct that Maj Anurag Pathak did bring the cash for payment of CPL to the site. As earlier stated, at times Maj Anurag Pathak used to come and stand nearby watching payment being made by me to CPL. At times he used to interfere and tell a particular labourer putting thumb impression as to how to do it."

However, when the accused cross-examined him again on this reply given, the witness stated:

> "That Maj Anurag Pathak brought cash for payment was not related to his practice of otherwise checking the payment being made by me."

7. It is surprising that this witness was questioned by the Court at great length and his depositions were recorded and notwithstanding the fact that such a course was not permissible for the Court to adopt, nothing was brought out from the re-examination of this witness so as to shatter or

shake his depositions to the effect that the amount of Rs.840/- was paid to Shri Fransis Johanan on 8/3/94, after he had put in his thumb impression, the thumb impression was encircled and signed by the witness, Shri Fransis personally remained present and received the amount and at no point of time he ever complained that he did not receive the said amount of Rs.840/-. All other statements elicited from this witness by the Court by questioning him are irrelevant and based on such statements his testimony could not be discarded. If the prosecution felt that he was a hostile witness, it was necessary to declare so and subject him to cross-examination. This role could not be taken over by the Court or the Presiding Judge.

8. By discarding the evidence of Witness No.1 - Shri Rakesh Kumar Verma, the GCM has, in support of its findings against the petitioner, solely relied upon the evidence of the second witness of prosecution viz. Ataul Rehman, Sub Inspector of Assam Police. In our considered opinion the testimony of this second witness is required to be totally discarded so far as it related to the identification of the thumb impression concerned.

Admittedly Lt.Col. B.B. Bali, Presiding Officer, Court of Inquiry vide his letter dated 7th June 1996 had approached the CID Office of Additional DGP Uluwari, Gauhati-7 for obtaining information about thumb impression as enclosed in the said letter and on various civil paid labour vouchers. The finger print expert's opinion was received vide letter dated 9/10/1996. As against this the petitioner for the first time appeared before the GCM on 19th March 1998 and hearing of charge was held on 23/3/1998. After the Court Martial commenced, at no point of time the finger prints of the accused were obtained and such obtained finger prints were ever forwarded to the expert i.e. Prosecution Witness No.2. It is claimed that from the available record the alleged finger prints of the petitioner were photographed and such photographs were sent vide letter dated 7th June 1996 for inviting expert's opinion. The depositions of Prosecution Witness No.2 as recorded while in the examination-in-chief read as under:

> "I now show the specimen thumb impression which were provided to me with the muster rolls for study. The witness shows a document from his office file. The court observe that

it is a photocopy of thumb impressions. When enquired about the original the witness states that this photo copy only was provided from which photographs were taken. Since this document is in our office file this must be the document."

9. It was required to be proved beyond reasonable doubt that the finger prints of the petitioner were obtained either before or during the course of the GCM and such original finger prints were sent to the expert witness within the meaning of Section 45 of the Indian Evidence Act. It cannot be held beyond doubt that the photographed thumb impressions were that of the petitioner alone. This witness also was questioned by the Court and in fact this examination of the witness by the Court is one of the additional reasons to vitiate its findings. It is pertinent to note that the answers elicited from the Court's questioning are substantially the basis in support of the findings recorded by the GCM.

10. In the case of Lt. Col. Prithi Pal Singh Bedi v. Union of India & ors. **[AIR 1982 SC 1413]** the Supreme Court stated, inter alia,

"... Persons subject to Army Act are citizens of this ancient land having a feeling of belonging to the civilised community governed by the liberty oriented constitution. Personal liberty makes for the worth of human being and is a cherished and prized right. Deprivation thereof must be preceded by an inquiry ensuring fair, just and reasonable procedure and trial by a judge of unquestioned integrity and wholly unbiased. A marked difference in the procedure for trial of an offence by the Criminal Court and the court-martial is apt to generate dissatisfaction arising out of this differential treatment. Even though it is pointed out that the procedure of trial by court-martial is almost analogous to the procedure of trial in the ordinary Criminal Courts, we must recall what Justice William O'Douglas observed 'that civil trial is held in an atmosphere conducive to the protection of individual rights while a military trial is marked by the age-old manifest destiny of retributive justice. Very expression

> ‘court-martial’ generally strikes terror in the heart of the person to be tried by it..."

In the case of Union of India & ors. v. Major A. Hussain **[(1998) 1 SCC 537]** the scope of judicial review of the Court Martial proceedings was stated in the following words:

> "Though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court, or for that matter any court must stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provisions of law. It has been rightly said

that court-martial remains to a significant degree, a specialised part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a court where provisions of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate

investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and is within its powers to award punishment."

. The same issue of the High Court's powers of judicial review of the court-martial proceedings was considered in the case of Union of India & ors. v. Himmat Singh Chahar **[(1999) 4 SCC 521]** and answered as under:

"... It is of course true that notwithstanding the finality attached to the orders of the competent authority in the court-martial proceedings the High Court is entitled to exercise its power of judicial

review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceedings or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act. The said power of judicial review cannot be a power of an appellate authority permitting the High Court to reappreciate the evidence and in coming to a conclusion that the evidence is insufficient for the conclusion arrived at by the competent authorities in court-martial proceedings. At any rate it cannot be higher than the jurisdiction of the High Court exercised under Article 227 against an order of an inferior tribunal."

11. In the instant case we have noticed that the evidence of the prosecution witness no.1 was illegally discarded by the GCM and the evidence of

the prosecution witness no.2, which was an expert witness as contemplated under Section 45 of the Indian Evidence Act, could not have been accepted or relied upon as original finger prints of the accused were not forwarded to the said expert at any time and there was no witness examined by the prosecution in support of its contentions that the finger prints of the petitioner were obtained, photographs from the same were taken and the same were forwarded to the said expert vide letter dated 7th June 1996. Even the testimony of the prosecution witness no.3 - Ashish Kumar Mohapatra is silent on this issue. Mere suspicion, however, grave, cannot be a substitute for proof. The prosecution failed to prove this charge against the petitioner beyond reasonable doubts. We have also noted that the cross-examination of the witness was admittedly conducted by the 6th witness of the prosecution Maj. Kumar MV, who had also recorded the summary of evidence in GCM. This is one more reason to hold that the GCM proceedings were vitiated.

12. We, therefore, hold that the first charge regarding offence under Section 52(f) of the Army Act

as levelled against the petitioner has not been proved by the prosecution before the General Court Martial and, therefore, the conviction of the petitioner for the said charge cannot be upheld.

13. In the result this petition succeeds partly. The petitioner is acquitted of the charge regarding offence under Section 52(f) of the Army Act and the order of conviction and sentence on the said charge is hereby quashed and set aside.

. The impugned order of conviction passed by the Confirming Authority on 16th February 1999 for charge under Section 57(a) is hereby confirmed and we award the punishment of severe reprimand to the petitioner under Section 71(i) of the Army Act for the said charge.

14. Rule is made absolute accordingly with no order as to costs.

(J.H.BHATIA,J.) (B.H.MARLAPALLE,